

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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GIANINNA GALLARDO, AN )  
INCAPACITATED PERSON, BY AND )  
THROUGH HER PARENTS AND )  
CO-GUARDIANS, PILAR VASSALLO AND )  
WALTER GALLARDO, )  
                    Petitioner, )  
                    v. ) No. 20-1263  
SIMONE MARSTILLER, IN HER OFFICIAL )  
CAPACITY AS SECRETARY OF THE )  
FLORIDA AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
                    Respondent. )  
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Pages: 1 through 106  
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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: Justice  
4 Sotomayor is participating remotely this  
5 morning.

6 We'll hear argument this morning in  
7 Case 20-1263, Gallardo versus Marstiller.

8 Mr. Gowdy.

9 ORAL ARGUMENT OF BRYAN S. GOWDY  
10 ON BEHALF OF THE PETITIONER

11 MR. GOWDY: Mr. Chief Justice, and may  
12 it please the Court:

13 Medicaid provides a benefit to persons  
14 needing medical care. It is not a loan to be  
15 repaid later. The anti-lien and anti-recovery  
16 provisions, part of the original 1965 Medicaid  
17 law, reflect this policy by prohibiting states  
18 from taking any property belonging to a  
19 beneficiary, including her third-party  
20 liabilities.

21 But, in 1968, Congress, in  
22 subparagraphs (A) and (B), estab- --  
23 established a limited pool of third-party  
24 liabilities from which a state could seek  
25 reimbursement for Medicaid expenses. States

1     were directed, and I quote, "to ascertain the  
2     legal liability of third parties to pay for  
3     care and services available under the plan" and  
4     "to seek reimbursement to the extent of such  
5     legal liability."

6             A liability for future medical  
7     expenses does not pay for care available under  
8     the Medicaid plan and, thus, is not part of the  
9     pool of reimbursement funds.

10            The procedural tools enacted by  
11     Congress after 1968 did not change the pool of  
12     reimbursement funds. To the contrary,  
13     subparagraph (H) confirms that a state acquires  
14     only a beneficiary's rights to third-party  
15     payments, and I quote, "for health care items  
16     or services furnished" to the beneficiary.

17            Finally, Florida's isolated reading of  
18     the assignment clause cannot be right because  
19     it forces beneficiaries to make lifetime  
20     assignments, leading to absurd results that  
21     convert Medicaid from a benefit to a loan.

22            JUSTICE THOMAS: Counsel, the -- the  
23     limitations that you would apply in this case  
24     to the assignment, would you also apply it to  
25     child support?

1           MR. GOWDY: They apply the -- they  
2       apply the same, Your Honor. However, child  
3       support works differently than a tort recovery.  
4       Child support normally requires ongoing  
5       payments to cover all of the child's medical  
6       care. A tort payment is a one-time payment for  
7       limited medical care that was caused by the  
8       tort. So there -- it's -- so that's a --

9           JUSTICE THOMAS: Oh, I understand  
10      that, but your -- you said that these  
11      provisions limit -- the -- the provision you're  
12      talking about, the assignment provision, is  
13      very broad.

14           MR. GOWDY: Yes, Your Honor.

15           JUSTICE THOMAS: It doesn't have these  
16      built-in limitations. And I will take -- I  
17      will also agree that perhaps child support is  
18      very broad in a different way. But you said  
19      that the -- and they appear generally in the  
20      same part of the statute.

21           But you say that the provisions that  
22      you mentioned restrict the assignment, the  
23      broad assignment language. Why doesn't that  
24      also apply to the child support language?

25           MR. GOWDY: Well, Your -- Your Honor,

1 the -- the analysis would still be the same  
2 whether it's child support or tort recovery.  
3 The analysis would be -- the medical care --  
4 and I said yes when you said it's very broad,  
5 but the medical care mentioned in the  
6 assignment clause, in -- in our view, when read  
7 in the whole text, is shorthand for medical  
8 care covered by Medicaid, furnished by  
9 Medicaid, paid for by Medicaid, and, therefore,  
10 the analysis will be whether the third-party  
11 liability covers the same care, service, or  
12 item covered by Medicaid.

13 And my point about distinguishing  
14 between tort recoveries and childcare is tort  
15 recovery does -- often pays for items, care,  
16 and service not covered by Medicaid. For  
17 example, if you're a disabled person, you will  
18 need a special vehicle with medical equipment  
19 to be transported to your appointments.  
20 Medicaid does not cover for that, but a  
21 tortfeasor may have to pay for that.

22 Childcare, I think, is different in  
23 the other regard in that childcare requires the  
24 parent to pay for all medical -- medical care,  
25 whether it's covered by Medicaid or not, and,



1       therefore, I think it'll operate differently in  
2       that context than in the tort recovery context.

3               JUSTICE THOMAS:   Thank you.

4               MR. GOWDY:   I'd like to turn back to  
5       the -- the third-party liability provision if  
6       the Court doesn't have any questions.   The  
7       Solicitor General has correctly stated this is  
8       the anchor or main provision that sets a  
9       state's general duty to reinvert --  
10      reimbursement.   And to quote a little bit more  
11     than I did in my opening, in sub --  
12     subparagraph (B), it says "where such a legal  
13     liability is found to exist after medical  
14     assistance has been made available, the State  
15     will seek reimbursement for such assistance to  
16     the extent of such legal liability."

17              This language in the 1968 provision  
18     that establishes the pool of reimbursement  
19     funds clearly indicates that it is for  
20     third-party payments for medical assistance  
21     already provided by Medicaid, already incurred.  
22     And the -- the last phrase in subparagraph (B)  
23     refers to such legal liability, which must be  
24     -- is cross-referencing the phrase in (A), "pay  
25     for care and services available under the

1 Medicaid plan."

2 And as my hypothetical with Justice  
3 Thomas mentioned, many of the items, services,  
4 and care that a tortfeasor must pay for,  
5 whether we're talking about past or future  
6 medical expenses, are not covered by Medicaid.

7 So -- so, read sensibly, the  
8 third-party liability in (A) and (B) must be  
9 for the care, services, or items that have been  
10 made available by Medicaid to the beneficiary  
11 and can't be for future medical care, items, or  
12 services that may never be made available by  
13 Medicaid to the beneficiary.

14 JUSTICE KAGAN: Mr. Gowdy, I guess I'm  
15 not quite sure why you read this language, to  
16 pay for care and services available under the  
17 plan, why you necessarily read that as  
18 precluding payments for future expenses.

19 I mean, couldn't we just read that as  
20 saying something like, you know, there's --  
21 there are kinds of medical care that are  
22 available under the plan, and, regardless,  
23 whether they're past or future, those are the  
24 kinds of things that are covered, and then  
25 there are kinds of medical services that are

1 not available under Medicaid, and so that would  
2 not be covered.

3 But why is it a future/past  
4 distinction to have language like "available  
5 under the plan"? I -- I would think it's just  
6 a kind of service distinction.

7 MR. GOWDY: Right. And I understand  
8 Your -- Your Honor's reading of that, but we --  
9 we don't believe that's the most sensible  
10 reading in the entire text of all these  
11 provisions.

12 First, I would note that a dictionary  
13 definition of "available" is "present or ready  
14 for immediate use." And given the context  
15 here, especially how "available" is used in the  
16 -- in the immediately subsequent subparagraph,  
17 "have been made available," we believe that it  
18 -- it makes most sense to be talking about  
19 services that have been incurred or provided.

20 That also lines up with subparagraph  
21 (H). And then --

22 JUSTICE KAGAN: Right. I mean, you  
23 definitely have -- I mean, sort of the way I  
24 read these three provisions, like, (H) is for  
25 you, and (K) is for Florida, and then there's a

1 little bit of a -- and then I think, you know,  
2 (A) is -- is -- is harder, but I guess I'm  
3 wondering why I shouldn't basically read it --  
4 I'm not sure if it's really quite Florida's  
5 way, the -- the -- the alternative that I'm  
6 proposing. I'd like to ask General Whitaker  
7 about that.

8 But -- but why is -- I would not think  
9 that this language makes a distinction between  
10 current -- between past and future payments as  
11 opposed to payments for things that Medicaid  
12 covers and payments for things that Medicaid  
13 doesn't cover.

14 There are some things that we know  
15 that Medicaid is not going to cover, and -- and  
16 those are kind of read out of this provision.

17 MR. GOWDY: Right. Well, first, we  
18 would agree with the government's position.  
19 The focal point should be on what Medicaid pays  
20 for or covers. And so you can have this same  
21 issue come up as it did in the Doe case out of  
22 Vermont for past medical expenses.

23 Our context in this particular case  
24 and many cases is future medical expenses,  
25 which, in our view, are never available under

1 Medicaid, and I would give two reasons for  
2 that, Your Honor.

3 First, you -- you have to know the  
4 financial circumstances of the individual. And  
5 many persons who receive a tort recovery become  
6 immediately ineligible for Medicaid. So, until  
7 we know the moment in time that the medical  
8 care is administered and you look at that  
9 person's financial situation, you don't know if  
10 Medicaid is available.

11 Two, you have to know the person's  
12 medical condition. Even if someone receives a  
13 future medical expense award, because of the  
14 confines of a -- of a tort lawsuit, a jury has  
15 to make a -- a prediction about the -- the  
16 medical care that a person will need in the  
17 future.

18 But, as we know, sometimes people have  
19 more rapid recoveries. Sometimes things get  
20 worse. And then at that point in time when the  
21 medical care is needed is when the availability  
22 determination has to be made.

23 JUSTICE ALITO: What if -- what  
24 happens if the person who receives a tort  
25 recovery continues to be eligible for Medicaid

1 and continues to have medical bills paid by  
2 Medicaid? That does happen in some instances,  
3 doesn't it? Then would -- am I right on that?  
4 And, if I am, would -- would you say that  
5 Medicaid cannot recover for those expenses from  
6 the portion of the tort recovery that was  
7 allocated to future expenses?

8 MR. GOWDY: So, yes, you're right.  
9 People do remain on Medicaid after -- after the  
10 tort recovery. And especially it happens, as  
11 it does in this case, with disabled children.

12 JUSTICE ALITO: Right.

13 MR. GOWDY: Because they have what's  
14 called a special needs trust, which is  
15 discussed in the AAJ amicus brief.

16 To answer your question, the second  
17 question, no, the state may not recover from  
18 the future medical expense award, and I would  
19 -- really two reasons for that.

20 The moment of the tort recovery, that  
21 becomes the property of Ms. Gallardo and is --  
22 is protected by the anti-lien provision. And  
23 unless the state can point to an exception in  
24 one of these third-party provisions, it is  
25 protected.

1           And, secondarily, though, I would say  
2     the state is -- and -- and what we say, really,  
3     the assignment provision, 1396k, it -- it does  
4     two primary things, Your Honor.

5           One, it granted the state the right to  
6     control the beneficiary's cause of action for  
7     medical damages paid by Medicaid and to -- and  
8     to demand the beneficiary's cooperation in that  
9     action.

10           Florida would have the right, if it  
11     was concerned about life-long care for someone  
12     like Ms. Gallardo, they could sue the  
13     tortfeasor themselves and try to set something  
14     up similar to a workers' compensation system  
15     where you have ongoing payments.

16           JUSTICE ALITO: But why does that --  
17     why does that regime make sense?

18           MR. GOWDY: Well, if an award --

19           JUSTICE ALITO: Why should --

20           MR. GOWDY: I'm sorry.

21           JUSTICE ALITO: -- why should Medicaid  
22     not be able to recover for expenses that were  
23     covered by the tort recovery, the portion of  
24     the tort recovery for future medical expenses?  
25     Why does that make sense?

1           MR. GOWDY: Well, it makes sense, Your  
2 Honor, because the -- the -- because the few --  
3 because, at the moment of the tort recovery, we  
4 have to determine, is this person -- what is  
5 this property here?

6           And -- and just like today you may be  
7 on a certain health insurance policy, if you  
8 lose your job tomorrow, you're not, and,  
9 therefore, you will have to pay those expenses  
10 out of pocket.

11           So it'll be -- there are many cases  
12 where the person receives the tort recovery and  
13 they're ineligible for Medicaid, but whether  
14 they're ineligible or not, the -- the analysis  
15 has to be at the point in time of the recovery.

16           And as far as what I suggested about a  
17 workers' comp scheme, you know, if Florida were  
18 to -- or the states were to set that up, those  
19 often work where there's a determination that  
20 there's an injury that was in the course and  
21 scope of the employment, and then there could  
22 be future determinations where the workers'  
23 comp carrier has to make payments for future  
24 care.

25           Unfortunately, the tort system is not



1 set up like that, and liability policies aren't  
2 set up like that. There's a one-time payment.  
3 And, therefore, we have to look at, just like  
4 with the -- the damages we discussed in -- that  
5 were discussed in Ahlborn with respect to lost  
6 wages, pain and suffering, we have to determine  
7 who has the ownership of those damages at the  
8 time of the tort recovery.

9 JUSTICE SOTOMAYOR: Counsel, this is  
10 Justice Sotomayor.

11 MR. GOWDY: Yes, Your Honor.

12 JUSTICE SOTOMAYOR: I want to break  
13 down what you're saying. You've been using,  
14 and so have we, the Justices, past and future  
15 medical expenses.

16 But the government makes it very clear  
17 that this is not about past or future medical  
18 expenses. This is about the statute, the  
19 amount that the Medicaid has paid, correct?

20 MR. GOWDY: Correct.

21 JUSTICE SOTOMAYOR: And to the extent  
22 that at the moment of a tort recovery the  
23 government hasn't paid anything, it's not  
24 entitled to recovery under the anti-lien  
25 statute, correct?

1 MR. GOWDY: Correct.

2 JUSTICE SOTOMAYOR: And that's what  
3 Ahlborn said, which is you're only entitled to  
4 what -- the state is only entitled to what it's  
5 paid, and at the moment of recovery, that's all  
6 that it has a legal claim to, correct?

7 MR. GOWDY: Correct.

8 JUSTICE SOTOMAYOR: All right. So  
9 your -- as I understand your position as you've  
10 been discussing is, at the moment the lien is  
11 placed on a tort recovery, even at the time of  
12 an assignment, you -- you can only be assigned  
13 what you have a right to.

14 And they are claiming they have a  
15 right to all medical services. But the  
16 problem, any services, is they haven't given  
17 any services at that point, correct?

18 MR. GOWDY: Correct.

19 JUSTICE SOTOMAYOR: So they can't have  
20 a lien for services at that moment they haven't  
21 rendered?

22 MR. GOWDY: Correct.

23 JUSTICE SOTOMAYOR: All right. Now,  
24 with respect to Justice Alito's question, if  
25 I'm understanding it correctly, he's saying why

1       shouldn't we let Medicaid take. And your  
2       answer, I think, is we don't know what it's  
3       going to pay.

4               If the recovery is large enough, the  
5       person can become ineligible for Medicaid,  
6       correct?

7               MR. GOWDY: Correct.

8               JUSTICE SOTOMAYOR: Congress has given  
9       a trust for -- the right to take money that is  
10      given and place it in a trust for the medical  
11      care of the children, correct?

12              MR. GOWDY: If they are disabled like  
13      Ms. Gallardo, yes, correct.

14              JUSTICE SOTOMAYOR: Exactly. And so  
15      that's what happened here.

16              MR. GOWDY: Correct.

17              JUSTICE SOTOMAYOR: So it's not like  
18      that money is a windfall to her. It's being  
19      used to pay medical expenses?

20              MR. GOWDY: Yes, or like things for a  
21      van to get her to her appointment.

22              JUSTICE SOTOMAYOR: Right. But the  
23      point is it's not a windfall?

24              MR. GOWDY: No. And -- and I would  
25      add that when Ms. Gallardo dies, all the money

1 in the special needs trust goes back to  
2 Medicaid.

3 JUSTICE SOTOMAYOR: Exactly. And so  
4 it's not like med -- that the state is being  
5 denied anything?

6 MR. GOWDY: Correct.

7 JUSTICE SOTOMAYOR: Now, with respect  
8 to the future support payments that Justice  
9 Thomas pointed to in this statute, as I read  
10 that, that's not an assignment of any kind.  
11 It's just an obligation for paternity to be  
12 established and the parent to -- to be  
13 obligated to pay for medical care. It's not  
14 going to the state.

15 MR. GOWDY: Correct. That -- that's  
16 right.

17 JUSTICE SOTOMAYOR: All right. Thank  
18 you, counsel.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas, anything further?

22 JUSTICE THOMAS: Nothing.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Breyer?

25 JUSTICE BREYER: Well, I thought I

1     understood it, but I'm a little less certain  
2     now. Look, suppose that Medicare -- there's an  
3     accident, okay, and Smith caused it, and, as a  
4     result, Jones was in the hospital. His car was  
5     destroyed. He had some -- television set which  
6     was destroyed. He may have past -- he will  
7     have past bills for -- and probably in the  
8     future too for -- for his illness and, you  
9     know. My understanding was that the Medicaid,  
10    since he's on Medicaid, as of July 1, when  
11    we're all taking place, has paid already  
12    \$25,000.

13                 And the question was, I thought, but  
14    you better correct me if I'm wrong, the  
15    question was they'd like to get this 25,000  
16    back. And it's Smith, the causer, who has  
17    settled with the victim, where they think they  
18    can get some of the money. And they get some  
19    of the money because \$10,000 was set aside in  
20    this settlement for past expenses. Right?

21                 MR. GOWDY: Right.

22                 JUSTICE BREYER: And there is another  
23    15,000 in past expenses that Medicare has paid,  
24    and now they'd like to get that back too.

25                 MR. GOWDY: Correct. That's what --

1 JUSTICE BREYER: And they can't get it  
2 back from that part of the settlement that's to  
3 pay for the television set?

4 MR. GOWDY: Correct.

5 JUSTICE BREYER: They can't get it  
6 back from that part that is to pay for the  
7 automobile repairs?

8 MR. GOWDY: Correct.

9 JUSTICE BREYER: But there is a little  
10 bit here, which, let's say, says 20,000 or  
11 30,000, which is to pay for medical expenses,  
12 and it doesn't say whether it's past or future.  
13 So what Florida would like is to get back some  
14 of its past expenses from that portion of the  
15 settlement which seems earmarked for future  
16 expenses.

17 MR. GOWDY: Correct. That's what  
18 Florida wants.

19 JUSTICE BREYER: That's what this  
20 issue is, is it not?

21 MR. GOWDY: Yes.

22 JUSTICE BREYER: And one problem for  
23 you is the statute says it can, that statute.

24 MR. GOWDY: Well --

25 JUSTICE BREYER: But the other four

1 statutes seem to say, look, you are supposed to  
2 get back from the settlement that which is  
3 earmarked for past. You're not supposed to get  
4 back money earmarked for paintings or cars or  
5 television sets but only that part for past.

6 And it doesn't say a damn thing about  
7 you're getting money. In fact, it suggests the  
8 contrary, those four. Money from that part  
9 which is future.

10 Now I don't know why Congress wrote it  
11 that way. They might have written it that way  
12 because they thought a lot of people fall off  
13 Medicare, and by the time they get future,  
14 there won't even be Medicare people. Or they  
15 might have written it because Medicare future  
16 -- because future payments are -- are  
17 uncertain. But that's how they wrote it.

18 MR. GOWDY: Right.

19 JUSTICE BREYER: And so you're saying,  
20 hey, there's no more reason here -- I mean, now  
21 I'm back to Justice Kagan's question. That  
22 language in the last bit seems against you.

23 MR. GOWDY: It -- it -- I -- I  
24 understand that's the weak point for us, but I  
25 think -- now you kept saying Medicare, and --

1 JUSTICE BREYER: I meant Medicaid.

2 And I --

3 MR. GOWDY: Well, I wanted to point  
4 Your Honor, though, to 2651 --

5 JUSTICE BREYER: Yeah.

6 MR. GOWDY: -- which does -- and which  
7 is in the Medicare statutes, which does  
8 precisely what Florida really wants. And that  
9 statute allows Medicare to collect from the  
10 entirety of the tort recovery.

11 JUSTICE BREYER: Mm-hmm.

12 MR. GOWDY: And that makes sense  
13 sometimes, and Congress did that in 2013 with  
14 Medicaid and then nullified it with -- in 2018,  
15 because you would -- it makes sense to have the  
16 third party responsible for the tort to pay for  
17 all the medical care caused by the tort.

18 But, actually, Florida's reading and  
19 why I said at the beginning it was absurd, and  
20 I'm -- I'm trying -- I know I have to answer  
21 your question and I hope I'm doing that -- is  
22 that it's actually far broader, Florida's  
23 reading, than what 2651(a) does.

24 It allows a -- a lifetime assignment  
25 and would require third parties who are future



1 health insurers or future tortfeasors who did  
2 not cause Ms. Gallardo's injury to pay for the  
3 care that Medicaid paid for her injuries.

4 JUSTICE BREYER: Okay. It's  
5 complicated, but I -- I suppose --

6 MR. GOWDY: That -- well, that's not  
7 --

8 JUSTICE BREYER: -- that Congress --  
9 is Congress saying this to Medicaid agencies?

10 MR. GOWDY: Well --

11 JUSTICE BREYER: Medicaid agency, you  
12 want to get back the future payments? Here's  
13 what you do: Sue the tortfeasor yourself.

14 MR. GOWDY: Exactly. And I would just  
15 say that Florida has pointed to these other  
16 provisions, but none of them do this future  
17 lifetime assignment. And so that's why, in --  
18 in our view, that's just not a sensible  
19 reading, Your Honor.

20 CHIEF JUSTICE ROBERTS: Justice Alito,  
21 anything further?

22 Justice Sotomayor, anything further?

23 JUSTICE SOTOMAYOR: No. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?  
25 Justice Gorsuch?

1 JUSTICE GORSUCH: I'm afraid I do,  
2 Chief.

3 Medicaid is generally a statute about  
4 funding from the federal government to states.  
5 And if, in the normal course, we'd have a case  
6 about this, you might think of it between the  
7 federal government and the states, say, the  
8 state violates the anti-lien provision and the  
9 federal government stops paying.

10 That case would have a very different  
11 light to me, and it would raise federalism  
12 questions. Medicaid's a huge percentage of  
13 state budgets. We'd normally require the  
14 federal government, before it does something  
15 that drastic to a -- in -- in -- in our federal  
16 system to a state, to speak pretty clearly.

17 This case has a different light  
18 because we have an individual suing under 1983  
19 to protect tort compensation. But I wonder  
20 whether that premise that an individual can sue  
21 under 1983 is correct. I just don't know.

22 I know Florida has forfeited the issue  
23 in this case, and you're going to tell me that.

24 MR. GOWDY: I won't now.

25 JUSTICE GORSUCH: You -- you can.

1 People do it all the time. You can tell me  
2 again, all right?

3 And -- but a number of states have  
4 written to us saying: Gosh, be careful about  
5 deciding this case on that premise because it  
6 may not be correct.

7 Do you have any thoughts for us about  
8 that?

9 MR. GOWDY: Well, I -- first, I'd say,  
10 if you want to avoid the question and the  
11 opinions of those states that argue that, I  
12 obviously don't object.

13 JUSTICE GORSUCH: I knew it was  
14 coming. Okay.

15 MR. GOWDY: So -- but I do have a  
16 thought, that 1396p(a)(1), which is the  
17 anti-lien provision, and the anti-recovery  
18 provision in (B) are clear. They're clear.  
19 And they are -- they are rights for  
20 individuals. They're not rights the federal  
21 government is likely to assert because it's  
22 Ms. Gallardo who will lose her property and be  
23 unable to pay for care that Medicaid doesn't  
24 pay for.

25 JUSTICE GORSUCH: I understand that.

1     It was a legal question, though.  What in the  
2     statute makes you think that it's a right that  
3     belongs to individuals rather than to the  
4     federal government?

5             MR. GOWDY:  Because -- because the  
6     statute by its plain text says no lien may be  
7     imposed against the property of any individual.  
8     So it is her individual right that she has a  
9     right to assert here or in the lower federal  
10    courts.  And, furthermore, I believe it's  
11    clear, and the only condition here that is  
12    happening is it's not like the state is -- I  
13    know you have other cases where the state must  
14    do A, B, and C to receive federal funding, but,  
15    here, that condition that I just read is clear.

16            And what we're arguing about is  
17    whether the state can go seek some other money.  
18    And the federal government is telling them they  
19    can't.

20            But, anyway, to -- to directly answer  
21    your question, if you don't allow individuals  
22    to assert this right in federal court, it's  
23    effectively lost because it's the individual's  
24    -- it -- it's a statutory property right.

25            JUSTICE GORSUCH:  Very helpful.  Thank

1     you.

2                   CHIEF JUSTICE ROBERTS:   Justice  
3     Kavanaugh.

4                   JUSTICE KAVANAUGH:   To the extent that  
5     one provision, as Justice Kagan said, is  
6     helpful to you and one provision is not helpful  
7     to you, I want to ask you why we shouldn't look  
8     to the Medicare analogy that you were  
9     discussing with Justice Breyer as a sensible  
10    landing point for us to arrive at in resolving  
11    the discrepancy between the two provisions.

12                   What's different --

13                   MR. GOWDY:   Okay.

14                   JUSTICE KAVANAUGH:   -- about the  
15    Medicare?

16                   MR. GOWDY:   Well, so the Medicare  
17    statutes --

18                   JUSTICE KAVANAUGH:   Not -- not the  
19    language.

20                   MR. GOWDY:   Oh.

21                   JUSTICE KAVANAUGH:   But what would be  
22    wrong with resolving this and treating it in  
23    the same way as Medicare, given that you have  
24    assumed for the second contradictory  
25    provisions?

1           MR. GOWDY: Well, I -- I don't -- I  
2       guess the premise of your question seems to be,  
3       and correct me if I'm wrong, that the language  
4       in the assignment clause is similar to the  
5       language in the Medicare statute. And --

6           JUSTICE KAVANAUGH: I think the  
7       premise is that that language just is not  
8       helpful to you and other language in a  
9       different provision is helpful to you. So we  
10      have to sort out how are we going to figure out  
11      which provision to follow.

12           And if Medicare is -- is done one way,  
13      what sense would it make to have Medicaid done  
14      a different way on this issue?

15           MR. GOWDY: This -- here's -- well, I  
16      have two -- two responses.

17           One, you could follow the path of  
18      Judge Wilson in the dissent in -- in the Utah  
19      Supreme Court in Latham and you -- and you  
20      apply the general specific canon and the most  
21      recently enacted canon. And we've argued that  
22      and we get the same point for Ms. Gallardo.

23           Number two, Medicare and Medicaid are  
24      very different. Medicare, generally, you  
25      become 65, you're eligible, and you're eligible

1     for the rest of the time you're here on the  
2     earth.

3             Medicaid, you frequently see people  
4     going in and out of Medicaid, and it actually  
5     happens in tort cases a -- a lot.

6             You will have somebody who, when the  
7     tort happens, is on private insurance, then  
8     loses their job, can't make the COBRA payments,  
9     and by the time you get to trial, they're on  
10    Medicaid. And so you have -- that's -- that  
11    happens where I was talking with these past  
12    payments. You have some paid by private  
13    insurance, some paid by Medicaid.

14            And then they get the tort recovery  
15    and they're off. So there's a real distinction  
16    between Medicare and Medicaid in that regard,  
17    and so I don't think you can just apply  
18    Medicare -- and -- and, again, Florida's  
19    reading is a life-time assignment. It's not  
20    the same as -- Medicare -- the Medicare statute  
21    limits the recovery to the -- to the  
22    tortfeasor.

23            And though Florida says its current  
24    statute doesn't allow this, its reading of the  
25    assignment clause necessarily means that future

1     third-party payers who didn't cause the tort  
2     must pay for the past care caused by the tort.

3             JUSTICE KAVANAUGH:  Thank -- thank  
4     you.  That's helpful.

5             CHIEF JUSTICE ROBERTS:  Justice  
6     Barrett?

7             JUSTICE BARRETT:  Just one question.  
8     So, you know, as several people, including  
9     Justice Kagan, have said, 1396a --  
10    1396k(a)(1)(A), you know, favors Florida and  
11    the later enacted (25)(H) is better for you.

12            I think your case would be a lot  
13    harder if you just had 1396k to go on.  And I'm  
14    just wondering whether there are any cases  
15    interpreting 1396k before the later (25)(H) was  
16    enacted?

17            MR. GOWDY:  We did -- yes, if you look  
18    at page 40 -- give me one second -- page 45 of  
19    our brief, you'll see cases there from the --  
20    from the 1980s from state courts --

21            JUSTICE BARRETT:  Mm-hmm.

22            MR. GOWDY:  -- that were enacted  
23    before -- before the 1993 (H) provision.

24            So -- so the -- I -- I don't have any  
25    Federal Circuit court opinion or -- but those



1       --

2               JUSTICE BARRETT: But do they construe  
3       it your way?

4               MR. GOWDY: They -- they --

5               JUSTICE BARRETT: That -- that was --

6               MR. GOWDY: I'd have to go --

7               JUSTICE BARRETT: -- that was the  
8       question. I'm just wondering whether, when  
9       that was all there was, did the general  
10      interpretation of that provision favor you?  
11      Because that -- that makes a difference, right?  
12      Otherwise, your argument really hinges on  
13      (25)(H) having somehow narrowed the scope.

14              MR. GOWDY: I guess. So,  
15      historically, this is what I would tell you:  
16      Before the Ahlborn decision, which was in 2006,  
17      many state courts, including those in Florida,  
18      read these provisions as allowing the states to  
19      take all those things Justice Breyer mentioned  
20      a few minutes ago.

21              So this issue about -- between medical  
22      expense -- medical care, you don't see come up  
23      in the litigation very much because what was  
24      happening at that time was could we get the  
25      whole tort recovery, including the part for

1 lost wages, pain and suffering, and the  
2 television, okay?

3 JUSTICE BARRETT: Mm-hmm.

4 MR. GOWDY: So -- but what I would say  
5 about these cases on page 45 is that they  
6 basically apply background principles of  
7 subrogation, assignment, and insurance law,  
8 which the government and we have put in our  
9 brief, including in our reply brief, and those  
10 background principles line up with us.

11 JUSTICE BARRETT: Mm-hmm.

12 MR. GOWDY: So that's the best I can  
13 do. And -- and you just -- I don't think  
14 you're going to find -- I looked.

15 JUSTICE BARRETT: Mm-hmm.

16 MR. GOWDY: I looked really hard. And  
17 I don't think you're going to --

18 JUSTICE BARRETT: I assumed that you  
19 had.

20 MR. GOWDY: You're not -- you're not  
21 going to find these cases from that time period  
22 because of Ahlborn happening in 2006, which  
23 kind of really changed the way a lot of the  
24 lower courts were looking at this.

25 JUSTICE BARRETT: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Suri.

4 ORAL ARGUMENT OF VIVEK SURI

5 FOR THE UNITED STATES, AS AMICUS CURIAE,  
6 SUPPORTING THE PETITIONER

7 MR. SURI: Mr. Chief Justice, and may  
8 it please the Court:

9 Our position does not turn on any  
10 distinction between past and future medical  
11 expenses. It instead turns on who paid for  
12 those expenses.

13 Medicaid is entitled to the portions  
14 of the recovery that correspond to the things  
15 Medicaid paid for, and the beneficiary gets the  
16 portions of the recovery that correspond to the  
17 things the beneficiary paid for.

18 Justice Thomas, you asked about how  
19 this would work in the context of child support  
20 or medical support provided by a parent. Our  
21 answer is that it would work the same way. The  
22 same kind of allocation would have to be made.

23 Justice Alito, you asked how this  
24 would work in the context of payments that are  
25 made after the settlement. I agree that's

1 something that can happen, although it's  
2 unusual, and in that case, as I've said, we  
3 draw no distinction between past and future  
4 payments. The entitlement would turn entirely  
5 on who made the payment.

6 Justice Kagan, you asked about the  
7 word "available" in (A). And we agree that the  
8 word "available" can be read to mean  
9 theoretically available. But the key language  
10 here is not in (A). It's in (B). (B) is the  
11 provision that specifies the pool of funds from  
12 which the recovery can be obtained. And that's  
13 at the very end of (B) where it says "to the  
14 extent of such legal liability."

15 But, if you look earlier in (B), it  
16 says such a legal liability is found to exist  
17 after medical assistance has been made  
18 available on behalf of the individual. That  
19 makes clear that we're not talking about  
20 theoretical availability. We're talking about  
21 actually being made available.

22 In addition, if you look at page 7A of  
23 our brief, there's a regulation, 42 C.F.R.  
24 433.138, which interprets (A) itself to apply  
25 to services that are furnished and not merely

1 available under the plan.

2 Justice Kavanaugh, you asked about the  
3 Medicare analogy, and I don't think that  
4 analogy really helps in this context. That's  
5 because Medicare adopts the system that was  
6 rejected in Ahlborn. In other words, it's not  
7 the case that Medicare takes the pool of money  
8 that is attributable to future medical  
9 expenses. Rather, it takes from the entire  
10 pool of the settlement.

11 And now -- we think it's rational for  
12 Congress to have done one of two things. You  
13 could say you limit the -- the government to  
14 the pool of money that corresponds to the funds  
15 that have actually been paid for by Medicaid,  
16 and that would be fair to the beneficiary.

17 Alternatively, you could say that the  
18 government could take the entire settlement.  
19 That would be less fair to the beneficiary, but  
20 it avoids the administrative costs and hassle  
21 of having these allocation determinations.

22 But what's less understandable is why  
23 Congress would have adopted the middle ground  
24 that Florida wants, where you have the  
25 administrative expense of these allocation

1 proceedings, but you also don't have the  
2 fairness to the beneficiary because Medicaid is  
3 going beyond the pool that corresponds to the  
4 funds that Medicaid itself has paid for. In  
5 many ways, it's the worst of all worlds.

6 Justice Gorsuch, you had asked about  
7 Section 1983 and how that would apply here.  
8 The federal government agrees that the Court  
9 shouldn't reach that issue in this case. It's  
10 a difficult issue about how Section 1983 should  
11 be interpreted. There are also complications  
12 about whether it should be under Section 1983  
13 or Ex Parte Young. We'd urge the Court to  
14 reserve that case -- that issue for future  
15 cases.

16 Justice Breyer, your hypothetical  
17 involved Smith and Jones and Smith getting to  
18 pay I think it was \$15,000 out of the \$25,000.  
19 How does Medicaid recover the remaining  
20 \$10,000?

21 I think the way to deal with that is,  
22 first, the state could go after the tortfeasor  
23 directly. It has multiple avenues for doing  
24 that. It's received an assignment. It could  
25 use that assignment to bring the suit in the

1 first place.

2 Second, after the suit has been  
3 brought by the private individual, the state  
4 could intervene in that case.

5 Third, after the settlement has been  
6 reached, the state could say we're not a party  
7 to that settlement and we still want to sue the  
8 individual for the remaining money.

9 And in that suit, the state could ask  
10 for the full extent of its expenses.

11 But what the state is doing here is  
12 it's not going after the tortfeasor. It's  
13 going after the victim of the accident, and  
14 it's seeking funds that don't correspond to the  
15 things it paid for.

16 We think that's exactly what the  
17 anti-lien clause prevents the state from doing.

18 If there are any other questions, I  
19 welcome them.

20 JUSTICE THOMAS: Mr. Suri, the -- I am  
21 curious as to, in these cases -- this is a  
22 funding case, right? Why wouldn't you just  
23 sanction the State of Florida if you think  
24 they're out of compliance?

25 MR. SURI: Justice Thomas, we would be

1     entitled to do that under a separate provision  
2     of the Medicaid statute. I appreciate that you  
3     have written in a separate opinion that is  
4     cited in Florida's brief that that would be the  
5     appropriate sanction, the appropriate sanction  
6     wouldn't be preemption, but seven other  
7     justices disagreed with that proposition in  
8     that case, and we've gone with what the  
9     majority of the Court has determined.

10           That's also consistent with what the  
11     Court held in both Ahlborn and Wos, where it  
12     rejected a state's efforts, even though the  
13     alternative of the federal government  
14     withholding funding was theoretically  
15     available.

16           JUSTICE GORSUCH: I guess that's why I  
17     -- I would appreciate the government's effort  
18     to address my -- my question because, if this  
19     is a Spending Clause case, predominantly, and a  
20     relationship between the federal and a state  
21     government, we might expect the federal  
22     government to speak more clearly in prohibiting  
23     or limiting the state's powers than it has here  
24     before imposing a fine or maybe withholding  
25     Medicaid funds altogether, which is a huge



1 percentage of state budgets these days.

2 But, if there is a personal right to  
3 action here, that -- that -- that puts the case  
4 in a different light. And I just want to make  
5 sure we're not addressing a unicorn that  
6 doesn't exist but something that actually does  
7 exist in the world. And you tell us we don't  
8 have to decide it. I understand that. You  
9 don't need to tell me that again.

10 But how would the government have us  
11 resolve that question? Does it have any views  
12 it wishes to offer on that?

13 MR. SURI: At the very least, Justice  
14 Gorsuch, even if the case couldn't proceed  
15 under Section 1983, we expect it could proceed  
16 under Ex parte Young. The state is taking an  
17 action that would be contrary to federal law,  
18 and the individual is entitled to bring an Ex  
19 parte Young case to say that action cannot  
20 proceed.

21 Now the argument on the other side,  
22 according to the states' amicus brief that you  
23 have cited, is that Ex parte Young wouldn't  
24 apply where Congress has implicitly foreclosed  
25 it, and they've relied on this Court's decision

1 in Armstrong.

2 But Armstrong was a case in which the  
3 Court said that the provision being applied was  
4 judicially inadministrable, and, therefore, you  
5 could infer that Congress meant for the  
6 Secretary, rather than individual lawsuits, to  
7 be the mechanism through which that provision  
8 was enforced. That concern isn't relevant  
9 here.

10 JUSTICE SOTOMAYOR: Counsel, this is  
11 Justice Sotomayor. The strength that was  
12 conceded by Petitioner's counsel in k -- I'm  
13 not sure I agree that k is a weakness for the  
14 Petitioner. Are you in agreement with him?

15 MR. SURI: I will say only that k is  
16 the least strong of our provisions. I wouldn't  
17 say that it's weak. We have two arguments just  
18 looking at k alone.

19 The first that we would say is there's  
20 an absurdity argument that results from  
21 Florida's position. If Florida reads  
22 k(a)(1)(A) for all it's worth and the way that  
23 Florida insists it should be read, which is  
24 with no contextual limitations whatsoever, then  
25 it leads to an absurd result of a lifetime

1 assignment.

2           For example, imagine that Ms. Gallardo  
3 were to miraculously recover tomorrow, and 10  
4 years from now she has a slip-and-fall  
5 accident. If you take Florida's position to  
6 its logical conclusion, that's medical care, so  
7 Florida could look into the portion of the  
8 judgment that represents medical care for the  
9 slip-and-fall accident and use that to  
10 reimburse the car accident care that it's  
11 provided here. In fact, it would be required  
12 to do that because this provision says a state  
13 plan for medical assistance "shall."

14           The other things we would look to in k  
15 are the language indicating that k does not  
16 stand alone, that k has to be read in context.  
17 This includes, for example, the opening words  
18 of k(a)(A), "for the purpose of assisting in  
19 the collection of medical support payments."  
20 That word "assisting" suggests that k is not  
21 some freestanding provision. It's meant to  
22 implement the preexisting duty in a and b.

23           And, Justice Barrett, if I could  
24 quickly address your question about the  
25 sequencing of the statute here, the order in

1     which Congress enacted the provisions was first  
2     came a and b, then came k, and then finally  
3     came h. So we don't have to rely on h  
4     retroactively narrowing k, so to speak. We can  
5     just look at k being enacted against the  
6     backdrop of a and b, and if you agree with us  
7     on a and b, then k incorporates the same  
8     contextual limitation.

9             And even if you don't agree with that,  
10     there are a number of opinions in which this  
11     Court has said that a later-enacted provision  
12     can clarify an ambiguity in an earlier  
13     provision. An example of that would be Justice  
14     Scalia's opinion for the Court in United States  
15     against Fausto.

16             JUSTICE SOTOMAYOR: Now --

17             JUSTICE KAGAN: And, Mister --

18             JUSTICE SOTOMAYOR: Go ahead, Justice  
19     Kagan.

20             JUSTICE KAGAN: Mr. Suri, is there any  
21     argument here that k is more relevant than h or  
22     that h is more relevant than k? Or do we just  
23     have to deal with the whole ball of wax  
24     together somehow?

25             MR. SURI: I'm afraid you have to deal

1 with all of them together, Justice Kagan. We  
2 don't think -- we don't agree with the  
3 arguments that suggest that k is applicable but  
4 not h or that h is applicable but not k.

5 JUSTICE KAGAN: And -- and why is  
6 that?

7 MR. SURI: The reason is, first, that  
8 the Court said in Ahlborn that these provisions  
9 echo and reiterate each other. And, second, k  
10 has some features in it that would have to  
11 apply regardless of whether the government is  
12 proceeding under h or k, or else the statutory  
13 scheme would not make sense.

14 For example, there's a duty to  
15 cooperate in k that's not repeated in h. And  
16 if you treat these as two completely  
17 freestanding, unrelated provisions, then that  
18 would suggest that the beneficiary has no duty  
19 to cooperate under h.

20 Similarly, k says that the federal  
21 government gets a share of the recovery.  
22 That's not repeated in h either. And I think  
23 we'd be quite worried if states could say we're  
24 proceeding under h and we don't have to turn  
25 over any money to the federal government.

1 JUSTICE BARRETT: Mr. Suri, I'd like  
2 to ask you a question about the lifetime  
3 assignment absurdity. In your example, you  
4 talked about a tort settlement that came many  
5 years later and the state still retaining a  
6 right and an obligation, indeed, to get money  
7 from that settlement to pay.

8 Does that only work if the recipient  
9 is still on Medicaid?

10 MR. SURI: Not necessarily, Justice  
11 Barrett, because the assignment in this  
12 hypothetical would have been made at -- at the  
13 outset when the Medicaid assistance were being  
14 received for the first time, when Medicaid is  
15 paying for Ms. Gallardo's injuries the first  
16 time. And, presumably, the assistance would  
17 last for the rest of Ms. Gallardo's life  
18 because Florida says there's no limiting  
19 language in k(a)(1)(A).

20 JUSTICE SOTOMAYOR: Counsel, in your  
21 list of what states could do to protect  
22 themselves, you didn't mention the fact that  
23 the state at all times has a right to challenge  
24 the allocation of a settlement. If it believes  
25 the allocation with respect to past medical

1     payments was unfair, it can judicially or  
2     administratively challenge that allocation,  
3     correct?

4             MR. SURI: I agree, Justice Sotomayor.  
5     That is an additional tool at the state's  
6     disposal that prevents these harms that the  
7     state is talking about here.

8             Indeed, in this very case, the  
9     Eleventh Circuit took Petitioner to be arguing  
10    that the state was bound by the settlement  
11    allocation that the parties had privately  
12    agreed to, and the Eleventh Circuit rejected  
13    that argument.

14            We agree with the Eleventh Circuit  
15    that to the extent Petitioner was making that  
16    argument, that argument would have been  
17    incorrect. The state is entitled to challenge  
18    the allocation. And, again, the state doesn't  
19    have to limit itself just to the allocation.  
20    It can always sue the tortfeasor.

21            JUSTICE ALITO: To what extent does  
22    this issue implicate important interests of the  
23    federal government in the operation of the  
24    Medicaid statute?

25            MR. SURI: It does to some extent,

1 Justice Alito, in the following ways.

2 First, the federal government has an  
3 interest in recovering money. It gets a share  
4 of the state's recovery.

5 But, on the other hand, it also has a  
6 competing interest in protecting beneficiaries.  
7 As Mr. Gowdy said, Medicaid is not a loan.  
8 It's a benefit meant to be paid out. And the  
9 federal government has an interest in ensuring  
10 that states aren't, as it were, converting  
11 Medicaid into a loan that the beneficiary is  
12 then saddled with for the rest of her life.

13 JUSTICE ALITO: No, I -- I understand  
14 that. I guess what I'm thinking about is why  
15 the federal government hasn't itself taken  
16 actions against Florida and any other states  
17 that have laws like this?

18 MR. SURI: For two reasons, Justice  
19 Alito, both textual.

20 The first is, if you look at (A) and  
21 (B), they have the word "reasonable" in them.  
22 They provide that the state or local agency  
23 must take reasonable measures to ascertain the  
24 legal liability of third parties and that the  
25 state must pursue recovery when the



1 reimbursement that the state reasonably expects  
2 to recover exceeds the cost of the recovery.  
3 So we think that leaves states with some wiggle  
4 room.

5 And then the provision about  
6 withholding funds has, I think, the term  
7 "substantial compliance." So it's not just  
8 that any foot fault by a state would allow the  
9 federal government to come in and cut off  
10 funds. Rather, the state has to be not in  
11 substantial compliance with the statute.

12 Finally, we -- we wouldn't want to  
13 punish the innocent beneficiaries in Florida by  
14 cutting off the state's Medicaid's fund --  
15 Medicaid funds if that can be avoided.

16 JUSTICE GORSUCH: Why would an  
17 individual have a right to then sue for any,  
18 what you call foot fault, but the federal  
19 government can only intervene when there is  
20 substantial non-compliance?

21 MR. SURI: The statute uses the term  
22 "substantial" in the provision authorizing the  
23 -- the Secretary to deny approval. It doesn't  
24 use the word "substantial" in this context.

25 JUSTICE GORSUCH: Isn't it awkward to

1 think that the individual right would be  
2 broader than the federal government's?

3 MR. SURI: No, Justice Gorsuch. It  
4 may be that the federal government could itself  
5 have brought a lawsuit. It may not have been  
6 able to --

7 JUSTICE GORSUCH: Well, I thought you  
8 just told us it probably couldn't have.

9 MR. SURI: Couldn't have cut off  
10 funds. That doesn't --

11 JUSTICE GORSUCH: Okay.

12 MR. SURI: -- necessarily mean that it  
13 couldn't have brought its own lawsuit.

14 JUSTICE GORSUCH: Okay. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Thomas?

17 JUSTICE THOMAS: Just one brief  
18 question, Mr. Suri, addressing the preemption  
19 issue. Normally, when we have a preemption  
20 case, the federal government says do something  
21 one way. The state says do it another way.  
22 And there's a conflict.

23 In this context, the Spending Clause  
24 context, this is -- we normally analogize that  
25 to an agreement between the state and the

1 federal government.

2 Do you see that there's any  
3 difference? I -- I -- I'm -- it -- I don't see  
4 how you could say the laws are in conflict when  
5 it is embodied in an agreement, as opposed to  
6 two conflicting laws mandating certain conduct.

7 MR. SURI: Justice Thomas, the fact  
8 that a law is an agreement doesn't prevent it  
9 from also being a law with preemptive effect.  
10 Treaties, for example, are agreements, but they  
11 still have preemptive effect under the  
12 Supremacy Clause. Interstate compacts are  
13 agreements, but they have preemptive effect.

14 And, similarly, Spending Clause  
15 legislation, although it has been termed in the  
16 nature of a contract, they also have preemptive  
17 effect, as this Court has recognized many  
18 times. An example, if you'd like to look at a  
19 case, is Dalton against Little Rock Family  
20 Planning Services.

21 JUSTICE THOMAS: I don't think  
22 treaties do you much good, but I -- I see your  
23 point.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Breyer.

1 JUSTICE BREYER: For one minute I'd  
2 like to go back to Justice Barrett's question.  
3 Everybody agrees we're talking about Medicaid  
4 has paid \$25,000 medical expenses. We're only  
5 talking about what they paid.

6 And if we're only talking about when  
7 the victim sues the tortfeasor, there's a  
8 settlement, but can they collect that past  
9 expense from, and I think that she suggested  
10 that once upon a time it was possible to  
11 collect it from the whole settlement. You  
12 could collect it from the television part, from  
13 the house destruction part, the car,  
14 everything.

15 And then Congress narrowed it. And  
16 now you say they narrowed it to you can only  
17 collect from the part earmarked where that's  
18 fair, from past expenses. But the language  
19 says they've limited it down to anything in  
20 that settlement that has to do with medical  
21 expenses. And so what's wrong with that?

22 Now you made one point about future  
23 accidents and so forth. Forget that one. I  
24 understand it. I think you could get rid of  
25 that by saying it has to be this accident, but

1       that's a -- that's a -- I've got that point.

2       Anything else?

3               MR. SURI: Yes, Justice Breyer.

4               First, your question assumes that  
5       we're looking at k alone. But k shouldn't be  
6       looked at alone. It should be looked at in the  
7       context of a and b, which it's implementing,  
8       and in the context of h, which the Court in  
9       Ahlborn said it echoes.

10              In addition, if you look at  
11       k(a)(1)(C), it refers to a third party who may  
12       be liable to pay for care and services  
13       available under the plan. So there's, again,  
14       that same limiting language that's already in  
15       a, available under the plan. The same language  
16       is in k.

17              I grant it's not in the assignment  
18       provision specifically. It's in a different --  
19       it's in a different part of k. But it really  
20       wouldn't have made sense for Congress to say:  
21       Beneficiary, you must assign the state your  
22       rights with respect to all medical care, but  
23       then you only have to cooperate with the state  
24       with respect to the subset of that medical care  
25       that relates to the services provided by

1 Medicaid.

2 It's more reasonable to infer that  
3 Congress meant those provisions to be  
4 harmonious and have a similar scope.

5 CHIEF JUSTICE ROBERTS: Justice Alito?  
6 Justice Sotomayor.

7 JUSTICE SOTOMAYOR: Counsel, is there  
8 any way to accept Respondent, Florida's  
9 reading, without overruling essentially  
10 Ahlborn, the reasoning of Ahlborn?

11 MR. SURI: Justice Sotomayor, I don't  
12 wish to overclaim the relevance of Ahlborn. We  
13 think Ahlborn supports us in at least two  
14 respects.

15 First, the bottom-line result in  
16 Ahlborn. There was a settlement in that case  
17 where there was a portion, \$35,000, that  
18 represented past medical expenses that the  
19 state had paid for. There was also an  
20 additional portion that represented future  
21 medical expenses that the state hadn't paid  
22 for. And the Court's bottom-line judgment in  
23 Ahlborn was the state gets the \$35,000, not the  
24 \$35,000 plus the additional portion  
25 corresponding to the future medical expenses.

1           Second, there's a footnote in Ahlborn,  
2     Footnote 19, where the Court reasons that it  
3     would be unfair, unjust, to allow the state to  
4     obtain a portion of the recovery that it didn't  
5     compensate for. And we think that same  
6     unfairness arises in this context.

7           But, again, I don't wish to claim more  
8     of Ahlborn than -- than would be reasonable.  
9     The issue that's presented in this case was not  
10    squarely before the Court in Ahlborn, so we  
11    wouldn't go so far as to say that it's a  
12    binding holding on that point. We just think  
13    its reasoning supports us.

14           JUSTICE SOTOMAYOR: Thank you.

15           CHIEF JUSTICE ROBERTS: Justice Kagan?

16           JUSTICE KAGAN: Mr. Suri, I -- I'd  
17    like to ask you about an argument you didn't  
18    make, and it seems to me a good argument, the  
19    kind that I might ask General Whitaker about.  
20    But you didn't make it, and that makes me think  
21    it's a bad argument.

22           So here's the argument: It's from  
23    1396a(25)(I), and that provision is sort of the  
24    mirror image of k because it's where -- it's  
25    the requirement that insurers accept an

1 assignment of rights. And -- and that  
2 provision speaks very clearly about items or  
3 services for which payment has been made under  
4 the state plan; in other words, that provision  
5 seems to support your understanding of made  
6 payments.

7 And -- and -- and as I say, it seems  
8 as though (I) should be the mirror image of k,  
9 but then, again, you didn't make that argument.  
10 So why not?

11 MR. SURI: Justice Kagan, we made the  
12 argument at pages 18 and 19 of our brief. It's  
13 true I didn't repeat the argument at the podium  
14 today, but that's not because we don't think  
15 it's a good argument.

16 It -- it -- it is just as strong for  
17 us as h, but I will note it was enacted after  
18 k, and so you'd have the same questions about  
19 whether h and (I) should be interpreted as  
20 narrowing a previously a enacted provision, but  
21 we do agree it is very strong for us.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Gorsuch?

24 Justice Kavanaugh.

25 JUSTICE KAVANAUGH: I think you said a



1 minute ago that Florida's position would lead  
2 to an unfair or unjust scheme. But, again, I  
3 want to compare then the Medicare scheme is --  
4 is even broader in terms of the state's ability  
5 to recover than what Florida is proposing for  
6 the Medicaid regime.

7 Is that regime similarly unfair and  
8 unjust, or what -- what's the explanation  
9 there?

10 MR. SURI: That regime sacrifices a  
11 perfect fairness for administrative efficiency.  
12 That scheme allows Congress to say: We don't  
13 want to bother with these allocation hearings.  
14 We'll just let the state -- we'll just let the  
15 federal government take the full amount of the  
16 settlement.

17 Now Florida's scheme here that it  
18 proposes in this case wouldn't achieve that  
19 offsetting administrative advantage because you  
20 would still have to have the allocation  
21 hearings to determine whether a portion of the  
22 settlement is attributable to medical expenses  
23 or to something like pain and suffering, which  
24 even they concede they can't recover.

25 JUSTICE KAVANAUGH: I think earlier

1     you said that that would be the worst of all  
2     worlds, but in some sense, it gives the  
3     beneficiary a little more than the beneficiary  
4     gets under the Medicare regime but gives the  
5     state a little more than it would get under  
6     Petitioner's and your proposal. So why is that  
7     the worst of all worlds?

8             MR. SURI: It's the worst of all  
9     worlds because it neither achieves the  
10    administrative efficiency benefits of not  
11    having these allocation hearings nor achieves  
12    fairness.

13            Now I suppose you could defend that  
14    system by saying it -- it's a compromise, it's  
15    a little unfair to the beneficiary and a little  
16    unfair to the state.

17            Yes, I accept that in theory Congress  
18    could enact that system, but we just don't  
19    think that's the system Congress enacted here.

20            JUSTICE KAVANAUGH: And -- and last  
21    question. How is this operating in practice  
22    right now throughout the 50 states, and what  
23    implications would occur if we adopt Florida's  
24    position and, by contrast, your position?

25            MR. SURI: In the 50-state survey we

1 conducted before this argument, we uncovered  
2 nine states that --

3 JUSTICE KAVANAUGH: Glad I asked then.

4 MR. SURI: -- by judicial decision or  
5 express legislation do things the way that  
6 Petitioner would like. We identified six  
7 states that -- in addition to Florida itself,  
8 that do things the way Florida would like,  
9 again, either by legislation or judicial  
10 decision.

11 And most states were difficult to  
12 classify either because they said we will go to  
13 the maximum extent permitted by federal law or  
14 they parrot the federal provisions and so you'd  
15 have the same interpretive dispute under the  
16 state law that you're currently having under  
17 the federal law, or they're otherwise ambiguous  
18 or they haven't updated their statutes since  
19 Ahlborn, so it isn't clear from the face of the  
20 statute what they would do now.

21 I would note, however, that the vast  
22 majority of lower courts have come out in  
23 Petitioner's direction, not in Respondent's  
24 direction. So, to the extent that's any guide,  
25 ruling for Petitioner would preserve the status

1       quo in this -- in this area.

2                   JUSTICE KAVANAUGH:   Thank you.

3                   CHIEF JUSTICE ROBERTS:   Justice  
4       Barrett?

5                   Thank you, counsel.

6                   General Whitaker?

7                   ORAL ARGUMENT OF HENRY C. WHITAKER

8                   ON BEHALF OF THE RESPONDENT

9                   MR. WHITAKER:   Mr. Chief Justice, and  
10       may it please the Court:

11                   Medicaid is an important and expensive  
12       part of the social safety net.  To help keep  
13       Medicaid solvent, Congress made Medicaid the  
14       payer of last resort, meaning that other  
15       available resources should pay medical expenses  
16       before Medicaid pays.  As part of that role,  
17       Medicaid recovers money from tortfeasors who  
18       injure Medicaid beneficiaries.  When it does  
19       so, Medicaid can never be reimbursed for more  
20       than it paid out in benefits.

21                   The question here is whether the  
22       program may seek that reimbursement from a tort  
23       settlement, not only out of medical damages or  
24       medical expenses paid in the past but also for  
25       medical expenses that will be paid in the

1 future.

2           Section 1396k of the statute answers  
3 that question. It provides for Medicaid  
4 beneficiaries to assign to the program rights  
5 to payment for "medical care," not past medical  
6 care, not some complicated subset of medical  
7 care. Medical care, period, including payments  
8 for medical care that may be necessary in the  
9 future.

10           That reading is confirmed by  
11 subsection (B) of section 1396k, the remainder  
12 provision. Medical expenses may include  
13 expenses that Medicaid paid and expenses that  
14 the beneficiary paid. The remainder provision  
15 says that if Medicaid recovers all of those  
16 medical expenses, Medicaid is reimbursed for  
17 its expenses and the remaining amount goes to  
18 the beneficiary.

19           But, if there isn't enough money to  
20 reimburse both Medicaid and the beneficiary,  
21 the remainder provision says that Medicaid gets  
22 paid first. In other words, far from  
23 prohibiting Medicaid from recovering out of all  
24 medical damages, Section 1396k gives Medicaid's  
25 reimbursement claim priority over other claims

1 to medical expenses.

2 The result is neither untoward nor  
3 surprising. Medicaid can never be reimbursed  
4 for more than it paid out in benefits.  
5 Medicaid can also never receive any non-medical  
6 damages, but because it is the payer of last  
7 resort for medical expenses, it may recover  
8 from all medical damages.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: General Whitaker,  
11 Petitioner says that if we accept your  
12 interpretation of 1396, that you will be able  
13 to get or benefit from a lifetime assignment  
14 that covers third-party payments for future  
15 medical needs.

16 What do you think of that?

17 MR. WHITAKER: Well, I think it's --  
18 it's not correct. It's not an -- it's not an  
19 implication of our position. It's not how  
20 Florida has implemented the statute. And I  
21 think that Florida's implementation of the  
22 statute is correct.

23 Florida -- in Florida, the lien can  
24 attach only to an injury for which Medicaid at  
25 least provided some payment. And that, I

1 think, is a natural reading of the statute,  
2 because the statute provides -- for a different  
3 reading, I think -- for a different reason, I  
4 think, than -- than -- than some of the -- of  
5 the things we've been discussing today. I  
6 think the reason is it's natural to think of an  
7 assignment of a right that is being made in  
8 exchange for a medical payment to be related in  
9 some way to that medical payment. And so I  
10 don't think that would be within the scope of  
11 the assignment.

12 Here, however, what we have is what  
13 everybody agrees is a valid assignment, and the  
14 only question is, does the state's payment for  
15 medical care extend to all medical care or only  
16 some medical care?

17 JUSTICE THOMAS: But what about future  
18 medical care? He's -- they -- he suggests that  
19 your reading would result in all future medical  
20 care --

21 MR. WHITAKER: No, Your Honor --

22 JUSTICE THOMAS: -- being covered.

23 MR. WHITAKER: -- it does not result  
24 in all future medical care. Consistent with  
25 Florida's -- result in the state being able to

1 recover from all future medical care.

2           What has to happen is, if -- if the  
3 beneficiary -- if a Medicaid beneficiary is  
4 injured and Medicaid pays for it, Medicaid  
5 first seeks reimbursement out of the past  
6 medical expenses portion of the recovery. But,  
7 if that amount is not sufficient to satisfy  
8 Medicaid's claim, then it may, if necessary,  
9 get the remaining part of the future medical  
10 expenses part of the recovery, what --

11           JUSTICE THOMAS: And, finally, the  
12 distinction that the Petitioner made between  
13 child support and medical care, what do you  
14 make of that?

15           MR. WHITAKER: I don't think it makes  
16 any sense. The statute says that the Medicaid  
17 program is assigned rights to support that are  
18 for the purpose of medical care. If that -- if  
19 that -- if that payment happened in a lump-sum  
20 amount that was for the purpose of medical  
21 care, the program would absolutely have a right  
22 to -- to use that money to reimburse its costs.

23           So I think -- I think that is actually  
24 a quite strong textual indication that  
25 Section 1396k is not limited in the way that



1 the other side suggests, because the only  
2 example of a payment for medical care that we  
3 have in the statute does not fit their  
4 description of how payments for medical care  
5 that come from tort recoveries should work.

6 JUSTICE THOMAS: Thank you.

7 MR. WHITAKER: So the -- the --

8 CHIEF JUSTICE ROBERTS: Counsel, does  
9 the state ever participate in the underlying  
10 litigation that gives rise to the judgment or  
11 the settlement?

12 MR. WHITAKER: Well, certainly,  
13 Florida's statute allows us that authority. In  
14 terms of our practice right now, my  
15 understanding is that we don't do that, just --  
16 just because it's not cost-effective for it to  
17 do it that way, for us to --

18 CHIEF JUSTICE ROBERTS: Well, maybe  
19 not in every one, but if you have sort of ones  
20 where the amounts will be significant, that  
21 would avoid the allocation hearings after the  
22 fact, and you could address those things in the  
23 structuring of the -- of the settlement or the  
24 judgment, right?

25 MR. WHITAKER: Well, I'm not sure it

1     would necessarily -- well -- well, I guess we  
2     would have an assignment for payment for -- for  
3     medical expenses. That's presumably what we  
4     would be pursuing in that -- in that instance.

5             Yes, Mr. Chief Justice, I think that's  
6     right. I mean, certainly, we could bring these  
7     claims ourselves. I do think that, in general,  
8     it's more cost-effective for the beneficiary to  
9     bring these claims because, of course, after  
10    Ahlborn, the state -- the state's assigned  
11    rights doesn't even extend to pain and  
12    suffering. So, in most instances, the  
13    beneficiary is going to be suing anyway.

14            CHIEF JUSTICE ROBERTS: Well, you  
15    don't have to bring the actions yourself. You  
16    could have a provision in the state regulations  
17    or law that you need to get notice of  
18    particular settlements or judgments that  
19    implicate your rights to recovery, and then you  
20    could at the -- at the outset, you know,  
21    protect your interests in recovery of future  
22    expenses.

23            MR. WHITAKER: Well, that's right,  
24    Your Honor, and, indeed, our statute does  
25    require the beneficiary to provide notice. If

1 we lose this case, though, there's a -- there's  
2 a limited amount we can do to protect our  
3 rights because no matter -- no matter how well  
4 we protect our right to the medical expense  
5 portion of the recovery, it's -- it's -- it's  
6 in no event going to include the -- allow us to  
7 recover from future medical expenses.

8 And, again, we're only ever talking  
9 about recovering what Medicaid paid for in the  
10 past. Medicaid's -- Medicaid's claim is always  
11 limited to no more than what it paid for in the  
12 past.

13 And with respect, my -- the theme that  
14 my other side -- the other side paints about,  
15 well, Medicaid can only get what it paid for,  
16 it just does not square with the language of  
17 the remainder provision, which express --  
18 expressly contemplates that the state can  
19 recover out of -- out -- for expenses that it  
20 did not pay for.

21 And this Court made that quite clear  
22 in Ahlborn itself, and this is what this Court  
23 had to say in Ahlborn about the remainder  
24 provision.

25 JUSTICE SOTOMAYOR: Counsel, if that's

1 true, and you've just conceded that k -- the  
2 lien created by k is a lien on the -- on past  
3 medical expenses that have been paid, correct?

4 MR. WHITAKER: That is absolutely  
5 true, Justice Sotomayor, but that --

6 JUSTICE SOTOMAYOR: All right. So I  
7 believe that the argument that the opposite  
8 side is making is, if that's the amount of your  
9 lien and you're saying that you are entitled to  
10 payment for -- from any medical source,  
11 correct, from -- for medical care from any  
12 third party, they're saying, if you read that  
13 as broadly as you're claiming, that means that  
14 you're entitled to collect for that past  
15 payment from any medical care from any third  
16 party, payment for medical care from any third  
17 party in the future, whether it's related to  
18 this injury or not.

19 MR. WHITAKER: No, no, Justice  
20 Sotomayor, that does not follow, as I was  
21 explaining --

22 JUSTICE SOTOMAYOR: I know. But the  
23 only way to not follow it is to break your lien  
24 from the source of the payment, meaning here --

25 MR. WHITAKER: No, no --

1 JUSTICE SOTOMAYOR: -- the payment  
2 that was assigned to you, you're saying,  
3 included an assignment for future medical care.

4 MR. WHITAKER: No, Justice --

5 JUSTICE SOTOMAYOR: And what -- and  
6 what the government is saying is the payment  
7 that you're assigned is the payment for past  
8 medical care, period.

9 MR. WHITAKER: Well, as I -- as I said  
10 earlier, I think there is -- there would be a  
11 question in other cases, not present --  
12 presented here, about what kinds of rights are  
13 within the scope of the assignment in the first  
14 place. And Florida has implemented its statute  
15 to say that an unrelated tort recovery would  
16 not be within the scope of the state's assigned  
17 rights in terms of whether the state has a  
18 right to payment at all.

19 JUSTICE KAGAN: But put --

20 MR. WHITAKER: Here --

21 JUSTICE KAGAN: -- put Florida's  
22 statute aside, because I -- I think that the  
23 question that Justice Thomas and Justice  
24 Sotomayor are asking is, what in your  
25 understanding of the Medicaid provisions would

1 prevent a state from going that far?

2 MR. WHITAKER: I -- I guess I think  
3 the way I read the statute, Justice Kagan, is  
4 that let's say that a Medicaid beneficiary gets  
5 injured and -- and has to -- and has to incur  
6 medical expenses, and the beneficiary knows  
7 there's a tort recovery.

8 I suppose, I think that in theory, and  
9 I -- I admit that this seems kind of  
10 unrealistic, the beneficiary could just say, I  
11 don't want to accept these medical expense  
12 payments, I want to take my chances and go  
13 after the tortfeasor myself and use that to pay  
14 the medical expenses.

15 And that actually happened in a case  
16 not with regard to a beneficiary but with a  
17 hospital that declined Medicaid -- Medicaid  
18 reimbursement and actually decided to seek the  
19 third-party recovery itself.

20 So I do think that in the statute  
21 there is a notion that the assignment concerns,  
22 when it's -- when you're talking about  
23 assignment of a tort claim -- and this is a --  
24 a common way of reasoning when you have  
25 conditions on the receipt of government

1 funds -- I do think that there is a germaneness  
2 requirement, that when you're assigning the --  
3 a right to the state for -- specifically a  
4 right to a tort recovery, that it's not  
5 anything, it's something that is related to  
6 that payment. But --

7 JUSTICE KAGAN: And -- and that's not  
8 in any particular provision that you're seeing  
9 that. You're just seeing that in the very idea  
10 of what an assignment is?

11 MR. WHITAKER: Yes. I think that's  
12 fair to say. And also just from the fact that  
13 it's a -- it's a spending program.

14 But, look, all those -- all that --  
15 all that, I think, is quite orthogonal to the  
16 issue we have here because what we have here is  
17 what everybody agrees is a right that the state  
18 has to payment for medical care.

19 The other side agrees that we can  
20 recover medical expenses, payments for medical  
21 care. And the only question is, does medical  
22 care also include future medical care? And it  
23 does.

24 JUSTICE KAGAN: Right, but --

25 JUSTICE BREYER: Future -- well,

1 future -- here, it only involves recovery from  
2 past medical care. The question is what money  
3 can you collect it from. Am I right about  
4 that?

5 MR. WHITAKER: Absolutely, Justice  
6 Breyer.

7 JUSTICE BREYER: Okay. So forget  
8 about collecting from the future. We're not  
9 talking about that. We're talking about  
10 collecting money earmarked for future payment  
11 in order to reimburse the state for past  
12 payment.

13 MR. WHITAKER: That's absolutely  
14 correct.

15 JUSTICE BREYER: Okay. So, as I read  
16 these together -- and please don't let me go  
17 off on some incorrect reading because they're  
18 complicated, all right?

19 One, first rule, in two provisions we  
20 haven't much talked about, hey, the victim has  
21 got some money. You can't touch it.

22 There's a no lien provision. There is  
23 a no -- whatever the other one is called. No,  
24 you can't touch it, no recovery, no adjustment,  
25 no recovery, that's -- you can't touch it,



1 State. I don't care how he got it. It's his.

2 I overstate a little.

3 But exception, exception. Now the  
4 first thing that talks about exception is  
5 there's an exception for our past money, you  
6 know, Medicaid's paid already, and you can get  
7 back what it says is where that victim has a  
8 right to payment for that thing you've spent by  
9 any other party for such -- such health care  
10 items or services. That "such" clearly refers  
11 to you have a right from the tortfeasor to  
12 payment for past.

13 That's no more about a payment right  
14 to payment for future than it is to a right  
15 about for payment for balloons, for a right for  
16 payment in that part.

17 Then you have the next part, which is  
18 yours, and the next part says: Ah, but you  
19 should take an assignment, you can take an  
20 assignment, State, for payment for medical care  
21 from any third party.

22 Here, it doesn't say such. And so,  
23 literally, you've got your case right in that  
24 language. And the only difficulty there is it  
25 certainly seems to conflict with the language I

1 read just before it because we have a system  
2 that says don't take any of their money. Then  
3 it says take some of the money for the past  
4 stuff you paid, but take it only from, they  
5 have money coming from a future guy, a victim,  
6 a tortfeasor for that, and then you have  
7 something say take an assignment.

8           So it seems to me you're asking us to  
9 read these two provisions, higgledy-piggledy,  
10 slightly in conflict -- if not direct conflict,  
11 at least hard to make consistent -- and they're  
12 asking you, the government, to read them  
13 consistently with the whole spirit of the  
14 thing, which is leave the money with the  
15 Medicaid victim.

16           That's a long question, and I'm really  
17 interested if I got the analysis right, not the  
18 conclusion necessarily.

19           MR. WHITAKER: There is no conflict,  
20 Justice Breyer, between those two provisions.  
21 Subparagraph (H), which is the provision that  
22 you started out with about furnishing  
23 healthcare items or services, plays a different  
24 but complementary role in the scheme from  
25 1396k.

1           Congress added subparagraph (H) to the  
2     statute in 1993 to give Medicaid additional  
3     payment rights, operating principally as  
4     against insurers, who were evading the  
5     assignment provision in various respects.

6           So 1396a, sub -- subsection (a),  
7     paragraph (25), subparagraph (H), and that's --  
8     that's the provision you're referring to, is --  
9     is not in any way limiting the state's rights  
10    under an assignment. It is broadening it to  
11    make sure that Medicaid has an automatic right  
12    of subrogation when Medicaid makes payments,  
13    just like, Justice Kavanaugh, the -- the way  
14    that the -- the -- the Medicare -- the  
15    structure of the Medicare statute is exactly  
16    the same thing because what you have in  
17    Medicare is you have a broad provision, 26 --  
18    42 U.S.C. 2651, that gives the state broad  
19    authority to recover damages from tortfeasors.

20           But the most important point is that  
21    the Medicare secondary payer statute in 1395y,  
22    42 U.S.C. 1395y, similarly talks about  
23    providing Medicare an automatic right of  
24    subrogation when it comes to -- when -- when  
25    Medicaid makes certain payments, and a private

1 insurer may also be on the hook for those  
2 particular items or services.

3 And, indeed, in the government report,  
4 which -- which the United States cites as  
5 reflecting the reason that Congress added  
6 subparagraph (H) to the statute in 1993, they  
7 explicitly modeled it on the Medicare secondary  
8 payer provision. So there's no conflict.

9 And, Justice Breyer, you mentioned  
10 four statutes. Well, I do think that we only  
11 need one statute to have authority here. So  
12 one is good enough.

13 And -- but the most important point is  
14 that in all the other provisions, apart from  
15 1396k, that my friends rely on, the language  
16 they rely on is simply not present in 1396k.

17 JUSTICE KAVANAUGH: Can I --

18 MR. WHITAKER: Nor --

19 JUSTICE KAVANAUGH: -- can I follow up  
20 on 1396k and follow up on Justice Kagan's  
21 question, because it seems that you're  
22 taking -- and I don't mean to load it by saying  
23 this word -- but a literal reading of 1396k,  
24 and the other side is saying, no, you have to  
25 read it in context with the other provisions

1 and have it all make sense. And you say no.

2 But then you're presented with a  
3 hypothetical, maybe the absurd hypothetical,  
4 but it is a hypothetical that's been raised,  
5 and you say, oh, well, there, don't read it  
6 literally. Actually, there, there's a  
7 germaneness requirement. And Justice Kagan  
8 asked you where that came from.

9 So aren't you at least acknowledging  
10 that you get to context rather than just within  
11 the four corners of 1396k?

12 MR. WHITAKER: Justice Kavanaugh, I'm  
13 happy to -- to -- to read it in context, and I  
14 have no quarrel with that, but whether or not  
15 that that contextual limitation, that I was  
16 discussing from Justice Kagan, is or is not in  
17 the statute, I think the important point is  
18 that the particular limitations that the other  
19 side would have you read into k cannot be right  
20 because there are various other explicit  
21 indications in the statute that that is not  
22 what k means.

23 And, again, I spoke of this. You have  
24 the statute's remainder provision. You have  
25 the right to spousal support, which doesn't fit

1     their theory at all.  Again, rights to spousal  
2     support that are for the purpose of medical  
3     care does -- does -- does -- does not fit --  
4     fit their theory.

5             And -- and I think that the -- so --  
6     so I think --

7             JUSTICE KAVANAUGH:  Well, some of what  
8     you're just saying there answers another  
9     question I have and I want to get more, which  
10    is suppose -- and I know you disagree with this  
11    -- but suppose we think h points one way and --  
12    against you, and k points a little bit in favor  
13    of you.

14            How would you suggest we go about  
15    thinking about the resolution of that  
16    discrepancy or conflict?

17            MR. WHITAKER:  Well, I -- I guess I do  
18    -- I do think that -- that --

19            JUSTICE KAVANAUGH:  I think you're  
20    saying you don't agree with the premise.

21            MR. WHITAKER:  Well, I -- I don't  
22    agree with the premise, but I do think that --  
23    you know, the government talked about  
24    subparagraph (A) in paragraph (25) as being the  
25    anchor provision.  I actually think that, in

1     this context, it is very much that 1396k is the  
2     anchor provision.

3             And if you look at this Court's  
4     decision in Ahlborn, this Court's analysis of  
5     all of the third-party liability provisions was  
6     keyed off this key language in 1396k.

7             So I think it's fair to say that this  
8     Court in Ahlborn actually treated 1396k as the  
9     anchor provision, which --

10            JUSTICE KAVANAUGH:  So prioritize k,  
11     is what you would say?

12            MR. WHITAKER:  I would say that.  And  
13     I think that's supported by the fact that for  
14     16 years, before subparagraph (H) even existed  
15     in the statute, the only provision in the  
16     statute that spoke to the Medicaid program's  
17     payment rights was k.  And it would be quite  
18     odd, I think, to say that Congress had just  
19     sort of forgotten for all this time to -- to  
20     put this explicit limit into k or, worse still,  
21     to say that actually Congress sort of impliedly  
22     repealed k when -- silently when it enacted  
23     (H), not to restrict Medicaid's payment rights,  
24     but, rather, to take care of a specific problem  
25     that was -- that it was having with private

1 insurers.

2           And that, I think, Justice Breyer, is  
3 the explanation for why subparagraph (H) is  
4 worded slightly differently than k, because it  
5 is directed at -- primarily at insurers, who  
6 pay medical expenses for particular items and  
7 services, just like the Medicare secondary  
8 payer statute.

9           JUSTICE KAVANAUGH: What -- what about  
10 the idea that no one was even thinking about  
11 this until Ahlborn? Do you want to contest  
12 that? In other words, we're parsing language  
13 from a '77 and an '83 and -- but -- but,  
14 actually, until Ahlborn, the other side said no  
15 one was really contemplating this precise  
16 issue.

17           MR. WHITAKER: Well -- well, I think  
18 that actually probably -- that -- that -- that  
19 supports my position, actually, I think quite  
20 strongly because, consistent with Justice  
21 Barrett's question, I think counsel's answer  
22 was: Well, before Ahlborn, many states just  
23 assumed that they could get actually all -- all  
24 damages -- they could recover from all damages,  
25 even the TV, as Justice Breyer said.



1                   And -- and Congress no doubt enacted  
2   Section -- subparagraph (H) against that  
3   backdrop, knowing that the states had been  
4   administering the provision more broadly.

5                   And I think that -- that's -- that  
6   supports quite strongly that Congress did not  
7   in subparagraph (H) silently overthrow --

8                   JUSTICE KAVANAUGH:   What's your best  
9   support for the idea that that was the baseline  
10  against which Congress was operating when it --  
11  in 1993?

12                  MR. WHITAKER:   Well, I don't have a  
13  specific case on me, Your Honor, but I do know  
14  that -- that that was -- I do -- I do -- I do  
15  think it's correct, counsel's statement.   I  
16  can't point to a specific case right now, but I  
17  do think counsel's statement is correct.

18                  JUSTICE KAVANAUGH:   But you agree that  
19  that's the -- that was the understanding at the  
20  time?

21                  MR. WHITAKER:   Well, it may have --

22                  JUSTICE KAVANAUGH:   And, obviously,  
23  that helps you, but I'll -- he can address it.

24                  MR. WHITAKER:   It may not have been  
25  the uniform understanding.   It certainly was

1 the understanding of the Department of Health  
2 and Human Services, which, as this -- as this  
3 Court noted in Ahlborn, had two administrative  
4 adjudications that dated from the mid-'90s that  
5 basically interpreted the statute more or less  
6 to allow, indeed require, states to recover  
7 third-party liabilities out of all medical  
8 damages.

9 And -- and, certainly, I -- I also  
10 think that there are -- so, yeah. So I think  
11 that there were -- there were a variety of  
12 reasons why Congress enacted that. And if you  
13 look at the enactment of subparagraph (H), it's  
14 very clear on the face of the amendment that --  
15 that created subparagraph (H), that Congress  
16 was intensely concerned with the -- with  
17 insurers because there are a variety of other  
18 amendments that Congress enacted at the same  
19 time specifically directed at insurers.

20 Now --

21 JUSTICE KAGAN: General, can we --  
22 let's take a case which meets your germaneness  
23 requirement, that the -- the future payments  
24 are -- you know, arise from the same injury or  
25 accident, all right? But let's say that the

1 future payments are ones that the Medicaid  
2 program would not pay for. In other words,  
3 let's say the Medicaid program does not pay for  
4 certain kinds of home health aides or something  
5 like that.

6 Are you saying that the state can also  
7 recover money for those services, services  
8 that, you know, to use the language of (a)(B),  
9 are really not available under the plan?

10 MR. WHITAKER: Not only could we do  
11 that, we could also do that clearly with  
12 respect to any past medical expenses that  
13 Medicaid had covered. Again, the remainder  
14 provision, I think, reflects that -- clearly a  
15 recognition, I think, that certainly as to past  
16 medical expenses, even if the beneficiary has  
17 incurred expenses out-of-pocket, Medicaid has  
18 priority over the recovery from those damages  
19 for all of its -- all -- all the medical  
20 expenses, not just expenses --

21 JUSTICE KAGAN: So -- but where do you  
22 get that? Because (A)(B) really does say  
23 available under the plan. If these -- if -- if  
24 this money is for care and services that are  
25 not available under the plan, how is it that

1 the state can -- can get that?

2 I mean, then -- then k is not only  
3 fighting h; then k is very much fighting  
4 (A)(B), and not only the provision of (A)(B)  
5 that, you know -- not only (B), but also (A), I  
6 guess is -- is the way I would say it.

7 MR. WHITAKER: Sure. And I -- I want  
8 to get to the point about where it get it from,  
9 which is the remainder provision, but to answer  
10 your question about (A) and (B) first --

11 JUSTICE KAGAN: And the reason I see  
12 this as important, right, (A)(B) comes first,  
13 right? (A)(H) might be this weird tag along  
14 thing, but (A)(B) is first and --

15 MR. WHITAKER: I think, as the  
16 Petitioner in the opening brief noted at page  
17 48, subparagraph (A) does not speak to what the  
18 state can recover in any -- when it imposes a  
19 lien of this kind.

20 All (A) says, as I read it, is  
21 Medicaid plans, go out and find people who may  
22 owe money to the plan. It is not limiting in  
23 any way, the scope of the state's recovery  
24 rights.

25 Ditto for (B), which -- which simply,

1 as this Court noted in Ahlborn,  
2 cross-references the liability that  
3 subparagraph (A) establishes. So this notion  
4 that those provisions somehow limited the pool  
5 of the -- the state's pool of recovery all  
6 along since 1968, even though state Medicaid  
7 programs were merrily, apparently,  
8 administering their programs all this time to  
9 allow recovery for all damages --

10 JUSTICE KAGAN: Yeah, so I read you,  
11 then, as saying basically this is only a k  
12 case, you know? And this is very different  
13 from, I think, the -- the government's reading.  
14 Well, obviously, it is.

15 But this is only a k case. We should  
16 put aside h and we should also put aside  
17 (A)(B).

18 MR. WHITAKER: I don't think you  
19 should put them aside. I should -- I think you  
20 should read them to not derogate from the  
21 state's recovery rights under k. And I do want  
22 to address one thing because --

23 JUSTICE KAGAN: Well, I guess what I'm  
24 saying when I say "put aside" is because the  
25 way I read not -- (A)(B) and -- and not just

1 (B), which Mr. Suri says is stronger for his  
2 position than (A), but really (A), to pay for  
3 care and services available under the plan.  
4 And you're saying you can recover money even  
5 for care and services that are not available  
6 under the plan. And -- and so you're saying k  
7 just stands independent of (A), as well as of  
8 (H), and we should just put everything else in  
9 this statute out of our heads and just think  
10 about k?

11 MR. WHITAKER: Not at all. The  
12 language that you mentioned in subparagraph (A)  
13 does not speak to this issue. And I think the  
14 operative words in that provision are not so  
15 much "care and services available under the  
16 plan," but "liability to pay for."

17 And if you have, for example, a right  
18 of spousal support, which I think everyone  
19 would agree is a type of third-party liability  
20 covered by the statute, that right of spousal  
21 support for the purpose of medical care is  
22 available to pay for care and services  
23 available under the plan, even though the pool  
24 of money may have nothing to do whatsoever with  
25 any particular services Medicaid covered in the

1 past. It's just money that is available to pay  
2 Medicaid's costs. That's what (B) -- that  
3 that's what (A) says. And that's what (B) says  
4 too.

5 And Mr. Suri cited the -- the language  
6 in subparagraph (B) that talks about in any  
7 case in which a legal liability is found to  
8 exist after medical assistance has been made --  
9 made available on behalf of the individual.  
10 That's just saying that somebody who Medicaid  
11 provided medical assistance for. It's not  
12 limiting the state's pool of recovery in any  
13 way. And -- and the -- the only --

14 JUSTICE KAVANAUGH: What about the  
15 language at the end of (B), right?

16 MR. WHITAKER: Well, it says "to the  
17 extent of such legal liability," which, as the  
18 Court noted in Ahlborn, is a reference to  
19 subparagraph (A), which I was -- as I was  
20 discussing with Justice Kagan, does not itself  
21 limit the pool of funds.

22 All -- all (A) and (B) are saying is  
23 go out and identify third parties, state  
24 Medicaid plans, and once you find them, recover  
25 to the extent they are liable. If you have a

1     deadbeat spouse that owes child support, go out  
2     and -- and get that money to recover for  
3     Medicaid's costs. That's all that provision --

4             JUSTICE BARRETT: General Whitaker,  
5     all of the money? And I guess this just  
6     reflects that I'm not sure that I fully  
7     understand how it works in the context of  
8     spousal support or child support, because child  
9     support obviously isn't just for medical  
10    expenses. It's for clothing and -- and maybe  
11    schooling and all kinds of expenses, feeding  
12    the child.

13            So are you saying that the state can  
14    just go after the pool in an undifferentiated  
15    way?

16            MR. WHITAKER: Certainly not. And  
17    that's because the assignment right applies to  
18    rights to support that are "specified as  
19    support for the purpose of medical care by a  
20    court or administrative order."

21            So there is this -- so -- so we could  
22    definitely not get all of the support. We can  
23    get the support to the extent it is for medical  
24    expenses.

25            JUSTICE BARRETT: So would there be an



1 administrative hearing to allocate it in a  
2 similar way that there would be in a tort  
3 settlement?

4 MR. WHITAKER: I'm not aware of -- of  
5 -- of that happening, Your -- Your Honor. I  
6 think it would have to be sort of a separate  
7 court order in order --

8 JUSTICE BARRETT: It just seems very  
9 odd since that's not how -- you know, you don't  
10 have child support, I -- I would think, in the  
11 normal course, earmarked. This is solely for  
12 medical expenses.

13 MR. WHITAKER: Right. But it does  
14 happen sometimes, as I understand it. I mean,  
15 most of the time what happens is that the  
16 spouse is ordered to just buy health insurance,  
17 but it can happen in other ways too, as I  
18 understand it.

19 So -- but -- but it does happen.  
20 Florida does treat rights of spousal support  
21 somewhat differently from unallocated tort  
22 recoveries, to which the administrative  
23 proceeding applies.

24 But I did want to address a little --

25 JUSTICE SOTOMAYOR: Counsel, I -- I'm

1     afraid that I keep reading the child support  
2     section of this and it doesn't work any kind of  
3     assignment. All it says is that a state plan  
4     for medical assistance shall provide that the  
5     person you're covering be required to cooperate  
6     with the state to establish paternity and -- to  
7     establish paternity and get child support.  
8     There's no assignment in it at all.

9             MR. WHITAKER: Well, the assign --

10            JUSTICE SOTOMAYOR: But putting that  
11     aside, I'm a very simplistic person, okay?  
12     Under A, you say that the person is required to  
13     assign to you their entitlement to payment for  
14     past services only. They're -- you're not  
15     claiming that they have to assign to you  
16     payments for future care. So you -- that's  
17     correct, right?

18            MR. WHITAKER: Well -- well, no, Your  
19     Honor, that's not quite correct because I think  
20     that if Medicaid paid for an injury from --  
21     that -- from which the -- a tort recovery  
22     arose, then, yes, the assignment would  
23     encompass the right to payment for all medical  
24     expenses out of that.

25            JUSTICE SOTOMAYOR: That has -- that

1 have been paid by you?

2 MR. WHITAKER: Well, we could -- we  
3 could -- we could only recover --

4 JUSTICE SOTOMAYOR: So are you saying  
5 that -- are you saying that if you sued the --  
6 the tortfeasor, that you would be obligated to  
7 sue for past and future expenses, whether  
8 you're paying for them or not?

9 MR. WHITAKER: Yes. But we obviously  
10 would always in any -- in any case be limited  
11 to recovering no more than we paid out in  
12 benefits. And, again --

13 JUSTICE SOTOMAYOR: Exactly. So, at  
14 the point of your suit, you could only recover  
15 from the tortfeasor that which you paid,  
16 correct?

17 MR. WHITAKER: No more than what we  
18 paid, but that -- that wouldn't --

19 JUSTICE SOTOMAYOR: Now then let me  
20 stop. But you're also arguing then that you  
21 could sue also for future expenses that you  
22 don't pay?

23 MR. WHITAKER: I think we could sue  
24 for all medical damages, which could include  
25 both medical expenses that Medicaid paid. It

1     could include past expenses that Medicaid did  
2     not pay. And it could also include future  
3     medical expenses, which, as was noted in the  
4     opening --

5             JUSTICE SOTOMAYOR: That's quite --  
6     that really then undoes A, B, H, and all of the  
7     provisions of the Act, correct?

8             MR. WHITAKER: Oh, I don't think it  
9     undoes it -- undoes them at all. And just to  
10    answer your initial question, though, about the  
11    assignment, the assignment of support occurs in  
12    1396, subsection (a), paragraph (1),  
13    subparagraph (A), which does separately from  
14    subparagraph (C) provide for an assignment of  
15    the right to spousal support.

16            JUSTICE SOTOMAYOR: That seems  
17    extraordinary, that what you're reading into  
18    the statute, an anti-lien statute, that permits  
19    you only to get an assignment of what you have  
20    paid for.

21            Now you're saying the assignment under  
22    k is incredibly broader than that, whether you  
23    paid for it or not, whether you were required  
24    to pay for it or not, and future, that you're  
25    assigned the individual's entire rights.

1 That's what you're telling me?

2 MR. WHITAKER: Justice Sotomayor, the  
3 assignment is always limited by the maximum  
4 amount that Medicaid paid. If Medicaid pays  
5 all -- if Medicaid successfully recovers all of  
6 the medical expenses, then Medicaid will get  
7 its claim for past medical expenses fully paid.

8 And if there are any -- also any  
9 future medical expenses, the beneficiary will  
10 get the remainder. Likewise, if the  
11 beneficiary paid any past medical expenses, the  
12 remainder provision says that the beneficiary  
13 will get those as a remainder. But -- but if  
14 --

15 JUSTICE SOTOMAYOR: Does a beneficiary  
16 have to sue at all for past -- I don't see  
17 anywhere in here there's an assignment to the  
18 state, there's a subrogation by the state, but  
19 why should Medi -- why should any of the  
20 recipients bother to sue for what you're going  
21 to be paid --

22 MR. WHITAKER: Well --

23 JUSTICE SOTOMAYOR: -- if you're going  
24 to take it all anyway?

25 MR. WHITAKER: -- we can't take it all

1 under Ahlborn, Your Honor.

2 JUSTICE SOTOMAYOR: Well, no, because  
3 you're saying to me that if the pot is -- if  
4 the pot exceeds what you paid, there's no pro  
5 rata that's required at all, so why bother?

6 MR. WHITAKER: I think that  
7 beneficiaries, even -- even if we were able to  
8 recover from future medical expenses, would  
9 also have substantial incentives to still bring  
10 suit. And even as to --

11 JUSTICE SOTOMAYOR: Oh, yes, for pain  
12 and suffering, for everything else. But why  
13 bother suing for past medical expenses at all?  
14 They should just sue for future.

15 MR. WHITAKER: Well, I think it's  
16 because, under the remainder provision, they  
17 would, in essence, have the upside. So -- so I  
18 think that they -- they have -- but -- you  
19 know, so they have an incentive both on the  
20 non-medical damages side and on the non-medical  
21 -- on the medical damages side certainly to  
22 bring suit.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Justice Thomas?

1 JUSTICE THOMAS: Just briefly, General  
2 Whitaker. I think I have this on.

3 The -- I asked Mr. Suri about  
4 preemption, and you heard his answer. Just a  
5 brief comment from you on what you think about  
6 preemption in the context of Spending Clause  
7 cases like this.

8 MR. WHITAKER: Well, I think that  
9 there is a strong presumption against  
10 preemption and as well in Spending Clause cases  
11 that -- to -- to -- to read -- read Spending  
12 Clause statutes to impose obligations on the  
13 states that are not clear.

14 But I -- I think it's quite  
15 extraordinary for the federal government to  
16 read all -- apparently all of the state medi --  
17 all 87 paragraphs of the state Medicaid plan  
18 requirements in 1396 subsection a to sort of  
19 permit any beneficiary to argue that state law  
20 is ipso facto preempted, which -- which I would  
21 have thought the United States would have  
22 thought is inconsistent with the Secretary's  
23 enforcement authority.

24 So -- so it's an extraordinary  
25 position that they're -- that -- that they're

1 taking. And I can't imagine that those laws  
2 are preempt -- are preemption, that all of  
3 those provisions are preempted. And this Court  
4 did not so hold in Ahlborn or Wos. This Court  
5 only held that the anti-lien provision has  
6 preemptive effect.

7 It certainly doesn't follow from that  
8 that any state law that doesn't comply with any  
9 state -- any of the many state Medicaid plan  
10 requirements in -- in subsection (A) of 1396a  
11 are preempted.

12 JUSTICE THOMAS: Thank you, Chief.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Breyer, anything further?

15 Justice Alito?

16 Justice Sotomayor?

17 JUSTICE SOTOMAYOR: No, thank you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: I would -- I would  
20 like to ask you, General Whitaker, about I,  
21 because I does seem as though it's the mirror  
22 -- it should be the mirror image of k. k is  
23 talking about an individual being required to  
24 make an assignment, and then I is talking about  
25 an insurer being required to accept the



1 assignment.

2           So you would think that the two would  
3 -- would be phrased the same way, but they're  
4 not. I is phrased in a way that's very  
5 favorable to the other side because it talks  
6 about an item or service for which payment has  
7 been made under the plan.

8           So what are we to make of the fact  
9 that what is -- what should be a mirror image  
10 of k reads exactly the way you don't want it  
11 to?

12           MR. WHITAKER: I don't agree that it  
13 reads exactly the way I don't want it. I think  
14 it actually supports our idea that the two  
15 payment rights in 1396k and subparagraph H are  
16 independent.

17           And if you look at Romanette ii in  
18 subparagraph (I) -- and this is at page 3A of  
19 the government's appendix -- before the mention  
20 of the assignment provision, it says "except  
21 the state's right of recovery and the  
22 assignment to the state of any right of an  
23 individual or other entity to payment from any  
24 other party."

25           And I think that -- so I think that

1 recognizes that there are two different payment  
2 rights that are at work here, one established  
3 by k -- because, otherwise, Congress wouldn't  
4 have talked about two different rights of  
5 recoveries, one stemming from, I think,  
6 subparagraph (H) and the other stemming from  
7 1396k.

8           And it's not the mirror image at all,  
9 Your Honor, because subparagraph (I), as I read  
10 it clearly only applies to insurers. There's a  
11 question about whether (H) does, but clearly  
12 (I) applies only to insurers because Romanette  
13 i talks about -- imposes on insurance companies  
14 obligations to identify -- to -- to -- to bring  
15 to Medicaid's attention when Medicaid  
16 beneficiaries have insurance coverage and the  
17 like, which would be nonsense as applied to  
18 anybody who is a potential tortfeasor because  
19 -- unless we're all insurers to everyone in the  
20 world.

21           So -- so I think that it is limited.  
22 And Mr. Suri said: Oh, well, it doesn't make  
23 -- (H) has no duty of cooperation. But I think  
24 the reason for that is because insurers have  
25 other applicable provisions that require them

1 to cooperate with state Medicaid programs to  
2 help identify these liabilities, and roman --  
3 and (I) is a very good example of that.

4 And I think it reflects, just like the  
5 story I was trying to tell with regard to (H),  
6 that these provisions are directed at a  
7 different problem. And in -- subparagraph (I)  
8 was enacted in 2005 because even after the  
9 enactment of subparagraph (H), apparently  
10 insurers were still -- as it turns out, they  
11 don't like paying money to Medicaid too much,  
12 and so they were doing other things to evade  
13 Medicaid's rights. And so Congress come along  
14 -- came along and enacted subparagraph (I).  
15 But it didn't do any more than it did when it  
16 enacted subparagraph (H), limit or -- or enact  
17 -- or -- or -- or enact something that was  
18 declarative of an existing limit in -- in 1396k  
19 itself.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: In your brief,  
25 General, you note that Florida spends about 28

1 billion per year on Medicaid services, which is  
2 30 percent of the budget. How much would you  
3 save, roughly, if you prevailed in this case?

4 MR. WHITAKER: I've tried to get good  
5 numbers on that, Justice Kavanaugh.  
6 Unfortunately, I haven't been -- been able to.  
7 It's certainly something that's important to --  
8 to my agency. And -- and I know that it can  
9 result in a substantial difference in  
10 individual cases, as noted by the multi-state  
11 amicus brief, which -- which touches on -- on  
12 this issue.

13 But, unfortunately, I don't have great  
14 numbers on that. But it is important to -- to  
15 Florida's Medicaid program.

16 JUSTICE KAVANAUGH: And, second,  
17 Mr. Suri helpfully said that nine states do it  
18 Petitioner's way and six states, I think he  
19 said, do it your way, and it was hard to tell  
20 with other states. Do you want to give your  
21 view on how the practices in the states --

22 MR. WHITAKER: Well, I'd be interested  
23 to know how he came up with nine. That's --  
24 that's different from the count we came up -- I  
25 guess we couldn't compare notes before the

1 argument, but -- but we counted it as fewer. I  
2 thought that there were only five that we could  
3 find that explicitly allowed the recovery of  
4 future. And most of those were the result of  
5 the -- of states' high -- high -- judicial  
6 decisions that said that that they had to.

7 I only thought that it was at most  
8 California and Vermont that had actually  
9 arguably done this on their own without some  
10 kind of judicial prompting, on their own, but I  
11 have no reason to -- it's a little bit unclear,  
12 and obviously it's difficult to --

13 JUSTICE KAVANAUGH: Why -- then that's  
14 my question -- why is it unclear --

15 MR. WHITAKER: Well -- well, I think  
16 --

17 JUSTICE KAVANAUGH: -- in these 35  
18 other states?

19 MR. WHITAKER: -- it's somewhat  
20 unclear because many of these -- many of these  
21 statutes kind of don't speak to the issue. And  
22 a lot of the statutes are -- have the following  
23 structure where they just say something like  
24 the state has a lien up to the amount of  
25 medical assistance paid, and it doesn't really

1 specify in -- in detail how exactly the state  
2 can -- can recover on that lien and the like.

3 So -- so there are some states that  
4 have explicitly said that you can recover  
5 future medical expenses. Massachusetts is one.  
6 Oklahoma is one. Obviously in Florida.  
7 Florida is one. But -- but I could only -- we  
8 -- so -- so I do think that, you know, this  
9 Court's decision is very much going to set the  
10 tone for the country on -- on this issue. And,  
11 you know, state Medicaid programs are going to  
12 have to, you know, have a policy now, I think.

13 JUSTICE KAVANAUGH: Yes.

14 MR. WHITAKER: So --

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Barrett? No?

18 Thank you, counsel.

19 JUSTICE SOTOMAYOR: Counsel, just --  
20 I'm sorry, Chief -- just one question.

21 CHIEF JUSTICE ROBERTS: Sure.

22 JUSTICE SOTOMAYOR: Counsel, you just  
23 said that this decision will -- will force  
24 states to change. Your reading will force  
25 states to do what you're doing, correct?

1 MR. WHITAKER: I --

2 JUSTICE SOTOMAYOR: Because they're  
3 obligated, you're saying, under the statute to  
4 collect from whatever sources they can, so what  
5 you're saying is those states who have contrary  
6 laws to yours or explicit laws to the contrary,  
7 they would be preempted?

8 MR. WHITAKER: Well, I don't think the  
9 -- no, I don't think they would be preempted,  
10 Justice Sotomayor, because I don't believe that  
11 all of the state medical plan requirements in  
12 subsection (A) of 1396a are preemptive.

13 I do think you're -- it's certainly  
14 true, Justice Sotomayor, that the states would  
15 have an obligation likely to recover those  
16 third-party liabilities, although I agree with  
17 Mr. Suri that the statute does build in some  
18 flexibility for state Medicaid programs in  
19 seeking those recoveries and allows state  
20 Medicaid programs to weigh costs and benefits  
21 and only requires the identification of  
22 liabilities to the extent that it is  
23 reasonable.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Rebuttal, Mr. Gowdy.

2 REBUTTAL ARGUMENT OF BRYAN S. GOWDY  
3 ON BEHALF OF THE PETITIONER

4 MR. GOWDY: 1396k, Justice Kagan, you  
5 asked if it was inapplicable. We would say it  
6 is the least applicable, that this provision  
7 authorized states to directly pursue third  
8 parties for medical expenses paid by Medicaid,  
9 and in doing so, it abrogated the common law  
10 rules against claim splitting and against the  
11 assignment of personal injury actions.

12 And Florida has not exercised those  
13 rights in this case. Justice -- or the Chief  
14 Justice asked about is this ever used? It is  
15 occasionally in mass torts. You all may recall  
16 the tobacco settlements from the mid-1990s.  
17 Those were cases brought by states against  
18 tobacco companies for past medical expenses  
19 paid by Medicaid. Generally, the states don't  
20 jump into individual lawsuits.

21 But this provision gives them real  
22 force, but it's really the least applicable  
23 here compared to the other provisions we've  
24 been discussing today.

25 And, Justice Kagan, you brought up the



1     -- the home healthcare. And, Justice Barrett,  
2     you brought up some questions about child care.  
3     And I would like to try to tie them together.

4             The state's position here is a  
5     hyper-literal reading of the words "any rights  
6     to payment for medical care." Reading that  
7     hyper-literally, it's not just a future tort;  
8     it's a future insurance policy, it's a future  
9     parent who's ordered to pay for some type of  
10    medical care.

11            And under the state's reading, even if  
12    that future insurance policy is paying for  
13    things or -- or the parent is ordered to pay  
14    for things not covered by medical care -- I'm  
15    sorry, by Medicaid, the state told you today  
16    they could take it.

17            So, for example, if Ms. Gallardo's  
18    father was ordered to pay for the special  
19    medical equipment that she needs to get to her  
20    appointments, that is not covered by Medicaid,  
21    the state's position is that they could take  
22    that money.

23            And, finally, the state has talked --  
24    has danced around the other provisions, in  
25    particular h. You've been told repeatedly it

1 was primarily for insurers.

2 The plain language says "third party."  
3 A third party includes a tortfeasor. And this  
4 Court applied that language in Ahlborn. So  
5 it's not primarily for insurers. It's for this  
6 instance here and is directly applicable.

7 And (A) and (B), as we have indicated,  
8 which the state has not addressed in their  
9 brief, is for the legal liability of third  
10 parties to pay for care and services available  
11 under the plan.

12 And we did say -- we did point out at  
13 page 48 of our brief that there was certainly  
14 some confusion. We cited a case called White  
15 from New Mexico in 1974. There was some  
16 confusion about what that language meant by  
17 some courts. I see I'm -- could I just  
18 conclude? Just --

19 CHIEF JUSTICE ROBERTS: Certainly.

20 MR. GOWDY: Just -- and (H) clarifies  
21 that without a doubt in our view.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 The case is submitted.

25 (Whereupon, at 11:47 a.m., the case

1 was submitted.)

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